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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GINA LORRAINE ITALIANO, Defendant and Appellant.	H037303 (Santa Clara County Super. Ct. No. C1104758)

I. INTRODUCTION

Defendant Gina Lorraine Italiano pleaded no contest to buying or receiving a stolen motor vehicle (former Pen. Code, § 496d).[1] The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that she serve four months in county jail. At a subsequent hearing, the court modified probation by imposing gang conditions of probation. Relevant to this appeal, the gang conditions generally prohibit defendant from associating with gang members, being present at certain court proceedings, and being "adjacent to" a school campus.

On appeal, defendant first contends that the gang conditions of probation in general should be reversed because the trial court, in making the decision to impose the

[1] Further unspecified statutory references are to the Penal Code.

gang conditions, improperly relied on defendant's prior arrests and on expert testimony from other cases involving other individuals. Second, defendant contends that the written probation condition prohibiting her from associating with gang members is "unreasonable" because it would require her to stay away from her boyfriend, who is the father of her child. Third, defendant contends that the probation condition prohibiting her from being present at certain court proceedings is constitutionally overbroad. Fourth, defendant contends that the probation condition prohibiting her from being "adjacent to" any school campus is unconstitutionally vague and overbroad.

For reasons that we will explain, we will modify the probation conditions concerning court proceedings and school campuses. We will also order the written probation condition concerning gang association corrected to reflect the trial court's oral pronouncement. As so modified, we will affirm the order imposing gang conditions of probation.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint and Defendant's Plea*

According to written reports from detectives assigned to the Regional Auto Theft Task Force, a stolen Toyota Camry was found parked in San Jose. While conducting surveillance on the vehicle, a task force member saw defendant and Anthony Michael Perez approach the vehicle. Defendant, who wore socks on her hands, opened the driver's door and sat in the driver's seat. Perez looked around, placed his hand under his T-shirt, and then used his shirt-covered hand to open the front passenger door. He also sat inside the car. Shortly thereafter, both individuals exited the vehicle, opened the rear passenger doors, and entered the rear of the vehicle. Upon exiting the vehicle, both individuals reentered the front of the vehicle. Within a few minutes, defendant and Perez exited the vehicle and closed all the doors. Defendant removed the socks from her hands, and she and Perez walked away from the vehicle. Both individuals were taken into

custody. They each "had tattoos . . . identifying themselves as Norteno gang members" and they "both identified themselves as 'Northerners.' "

After defendant was taken into custody, she received multiple calls on her cell phone. A task force member answered defendant's cell phone. The caller, later determined to be Sabrina Burns, asked whether defendant was in the stolen vehicle and warned that the police were nearby. Burns approached the area on foot along with a male who had Norteño gang tattoos on his neck and forearms. They were contacted by the task force approximately 20 feet from where defendant and Perez were in custody and sitting on a curb. The male referred to Burns as his " 'girl.' " Although a task force member believed the street that the male and Burns had been walking on was a "Sureno area," the male contended that Norteños "controlled" the street. The task force member determined that the two had come from a "known Norteno area" approximately one block away. After Burns allowed the task force to see her cell phone, she was taken into custody.

Defendant and Perez were advised of their *Miranda* rights.[2] They subsequently admitted to knowing the vehicle was stolen, but they each claimed to have entered the vehicle to find a lost cell phone. After Burns was advised of her *Miranda* rights, she too admitted to knowing the vehicle was stolen and admitted to calling defendant and Perez to warn them about police in the area. The victim did not know defendant, Perez, or Burns, and did not give them permission to enter, possess, or drive the vehicle.

In April 2011, defendant and codefendant Perez were charged by complaint with buying or receiving a stolen motor vehicle (former § 496d). The complaint alleged that defendant and Perez "did buy, receive, conceal, withhold, and sell a motor vehicle, a 1990 grey Toyota Camry, that had been stolen, knowing the property to have been

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

stolen." Another codefendant, Sabrina Julia Burns, was charged by the same complaint with being an accessory to the felony (§ 32).[3]

In June 2011, defendant pleaded no contest with the understanding that she would serve four months in county jail. Defendant's counsel stipulated that there was a factual basis for the plea based on the "investigation reports" and waived referral for a full probation report.

B. *Sentencing*

The probation officer prepared a waived referral memorandum that did not detail the circumstances of defendant's crime or provide the prior history or record of defendant. The waived referral memorandum did indicate that, based on a "police report," defendant and Perez had identified themselves as " 'Northerners.' " Based on this reference to "having 'Norteno' street gang affiliation," the probation officer recommended "full gang conditions."

At the July 15, 2011, sentencing hearing, defendant's counsel objected to the gang conditions recommended by probation. Defendant's counsel acknowledged that "in the probation report . . . defendant and co-defendant identified themselves as Northerners, that a reference is made to having Norteno street gang affiliation." Defendant's counsel argued, however, that there was no evidence of "gang motivation" for the crime and that there was no "nexus." The court responded that there were "two gang members committing a crime. I don't know if much more is needed." Codefendant Perez's counsel contended that defendant and Perez were in the vehicle looking for a cell phone and that "the 'Northerner' issue came about . . . because the police officer noticed some old gang tattoos that both of them had . . . ." Defendant's counsel later added that defendant and Perez had a "romantic relationship" and that defendant was pregnant with Perez's child. After hearing further argument from counsel, the court indicated that it

[3] Neither Perez nor Burns is a party to this appeal.

was "going to make all orders except gang conditions," that it was going to set another hearing on the issue of gang conditions, and that it wanted to do "research." The court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that she serve four months in county jail with 13 days of presentence credit.

On August 26, 2011, a hearing was held regarding whether the conditions of defendant's probation, and apparently Perez's probation, should include gang conditions. At the beginning of the hearing, the court held an unreported bench conference with counsel. Thereafter the court stated on the record that, "as indicated at bench," it intended to impose gang conditions. After hearing argument from counsel, the court imposed several gang conditions, which generally prohibit defendant from possessing gang-related clothing or other items, or visiting areas of gang-related activity. Relevant to this appeal, the probation conditions also provide that defendant: (1) "shall not associate with any person he/she knows to be or the probation officer informs him/her is a member of a criminal street gang," (2) "shall not be present at any court proceeding where he/she knows or the probation officer informs him/her that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless he/she is a party, he/she is a defendant in a criminal action, he/she is subpoenaed as a witness, or he/she has the prior permission of the probation officer," and (3) "shall not be adjacent to any school campus during school hours unless he/she is enrolled or with prior permission of the school administrator or probation."

On August 29, 2011, defendant filed a timely notice of appeal from the August 26, 2011 order modifying probation to include gang conditions.

III. DISCUSSION

A. *Gang Conditions in General*

Defendant contends that the gang conditions in general should be reversed because the trial court improperly relied on defendant's prior arrests and on expert testimony from

other cases involving other individuals. Regarding prior arrests, defendant argues that the court unreasonably inferred that her prior arrests were for gang-related activity, and that the absence of information about the facts underlying the arrests rendered the arrest information insufficient for making a sentencing decision. Regarding expert testimony from other cases, defendant asserts that she was deprived of the right to be present, to participate in the hearing, and to challenge the evidence. She asserts that the court's reliance on prior arrests and on expert testimony was an abuse of discretion and violated her federal and state rights to due process, and that the error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), and *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). Although defendant acknowledges that she did not object below to the evidence considered by the court, she contends that she did not have the opportunity to object, any objection would have been futile, and that trial counsel rendered ineffective assistance to the extent her claims were not adequately preserved.

The Attorney General contends that defendant forfeited her claim concerning the court's reliance on impermissible evidence. The Attorney General further contends that reliance on past arrests is not improper, that the court relied on other "proper factors," that the substance of the expert testimony was available from other sources in the record, and that defendant fails to demonstrate ineffective assistance of counsel.

1. Background

At the beginning of the August 2011 hearing to determine whether gang conditions of probation should be imposed with respect to defendant and codefendant Perez, the trial court held an unreported bench conference with counsel. Thereafter, the court stated on the record that, "as indicated at bench," it intended to impose gang conditions. The court then heard argument from counsel. Defendant's counsel argued that the offense was not "gang related," that defendant and Perez were in a "romantic relationship," and that defendant was pregnant with Perez's child. Defendant's counsel acknowledged that the court had cited *People v. Lopez* (1998) 66 Cal.App.4th 615

(*Lopez*) and that the court had indicated its reasons for imposing gang conditions in this case. Defendant's counsel argued, however, that some of the considerations in *Lopez* were "the probationer's gang affiliation and pattern and criminal activity and whether that warrants gang related conditions in a particular case." Defendant's counsel stated: "I do not believe [defendant] has a pattern of criminal activity toward such a conclusion and on that basis I would object."

The prosecutor responded that the records of defendant and Perez were "replete with serious, violent crimes. They have gang tattoos, they have engaged in prior gang activity. [¶] The entire purpose of the probationary scheme when it relates to gang members is to either discourage their gang membership or put them where they can't get out anymore and can't do any more harm to the community . . . . [¶] . . . [A]nd the case the court has given us this morning clearly talks about the fact that you don't need this to be a gang case per se. Both of them because they're hanging out with each other are hanging out with a gang member and this couldn't be any more clear that they should have gang orders."

The trial court ultimately ruled that gang conditions would be imposed. The court explained that based on *Lopez*, *supra*, 66 Cal.App.4th at page 626, it had "considered [defendant's and Perez's] age, gang affiliation and criminal past and present." The court "recognize[d] that an essential element of [defendant's and Perez's] effort at rehabilitation is for these folks to refrain from activity with gang people, gang members that could lead them to further crimes against society. And also reviewing the arrest history of [defendant] it includes things like throwing substances at vehicles. Very common as I heard in a . . . gang [case] yesterday that that is also what gang people do; they throw substances at vehicles. [¶] Trespassing arrests. These are handled informally in juvenile hall. And things like that are things that gang members engage in and it's important for [defendant] not to be around gang members where she's tempted to engage in those types of activities in the future. [¶] In looking at Mr. Perez'[s] history as well;

vandalism and . . . disturbing the peace, those are also things that gangs involve themselves in so it is important for Mr. Perez not to hang around with gang members with temptation to commit those types of acts in the future. [¶] Their age of 21 years old is an impressionable age where they certainly could continue in that type of conduct. Now they're escalating their conduct with further thefts. One of them had a petty theft previously and now further theft in this case. [¶] They admitted to the police officers that they were Northerners. My experience hearing gang experts testify, that's equivalent to being a Norteno street gang member. And they were in a Norteno area when this crime occurred. And they have gang tattoos I understand. [¶] For all these reasons," the court found the gang conditions reasonable.

2. Analysis

Assuming defendant did not forfeit her claim on appeal, we determine that any error concerning the trial court's consideration of defendant's prior arrests and gang expert testimony from another case was harmless under any standard of review. (See *Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.)

" 'The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.] The primary goal of probation is to ensure "[t]he safety of the public . . . through the enforcement of court-ordered conditions of probation." [Citation.]' [Citation.] Accordingly, the Legislature has empowered the court, in making a probation determination, to impose any 'reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . .' (Pen. Code, § 1203.1, subd. (j).) Although the trial court's discretion is broad in this regard, . . . a condition of probation must serve a purpose specified in Penal Code section 1203.1. [Citations.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) "Generally,

'[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' [Citation.]" (*Ibid.*)

In *Lopez*, the appellate court determined that the gang conditions imposed in the case before it "promoted section 1203.1's goals of rehabilitation and public safety by forbidding conduct reasonably related to future criminality. [Citation.]" (*Lopez*, *supra*, 66 Cal.App.4th at p. 626.) The appellate court explained that "[p]rohibitions against a variety of gang-related activities have been upheld when imposed upon juvenile offenders. [Citations.] Because '[a]ssociation with gang members is the first step to involvement in gang activity,' such conditions have been found to be 'reasonably designed to prevent future criminal behavior.' [Citation.]" (*Id.* at p. 624, fn. omitted.) "[P]robationary proscriptions against gang-related conduct are equally proper when imposed upon adult offenders such as [the defendant]. The path from gang associations to criminal gang activity is open to adults as well as to minors." (*Id.* at p. 625.) With respect to the defendant, the appellate court determined that, even if the evidence was insufficient to show that the defendant's present crime was gang related, the defendant's "age, gang affiliation, and consistent and increasing pattern of criminal behavior warranted a conclusion by the trial court that [the defendant's] disassociation from gang-connected activities was an essential element of any probationary effort at rehabilitation because it would insulate him from a source of temptation to continue to pursue a criminal lifestyle. [Citations.]" (*Id.* at p. 626.)

In the present case, the trial court explained at the August 2011 hearing that it had considered defendant's and Perez's age, gang affiliation, and criminal past and present in determining whether gang conditions should be added to their conditions of probation. Regarding age, the court observed that defendant's and Perez's "age of 21 years old is an impressionable age . . . ." As to gang affiliation, the court noted that they had gang

tattoos and they admitted they were "Northerners," which the court understood to mean a Norteño street gang member. Regarding the crime itself, the court observed that defendant and Perez were in an area claimed or known for Norteño gang activity. Further, at the prior July 2011 hearing in which probation was granted, the trial court characterized the case as involving "two gang members committing a crime." Given the court's comments concerning defendant's young age, gang affiliation, and the circumstances of the offense, we believe that the court would have imposed gang conditions even if the court had not considered defendant's arrest history.

We reach the same conclusion concerning the trial court's determination that being a "Northerner" was "equivalent to being a Norteno street gang member" based on gang expert testimony from another case. Even if the court had not considered such testimony from another case, we believe the court would still have concluded, reasonably, that defendant and Perez were associated with the Norteño gang. The record reflects that one of the detectives assigned to the Regional Auto Theft Task Force, as well as the probation officer, referred to defendant's self-identification as a Northerner in the context of discussing whether she was affiliated with a gang, and specifically the Norteño gang. Although the parties on appeal dispute whether the court below could have taken judicial notice that a Northerner is a Norteño gang member, we believe the court could have reasonably inferred from the detective's written report and the probation officer's waived referral memorandum that a Northerner is at least a person affiliated with the Norteño gang.

We are not persuaded by defendant's argument that the information challenged on appeal—prior arrest history and gang expert testimony from another case—was the "important" information on which the trial court relied in determining whether to impose gang conditions. The court's comments at the July 2011 hearing indicate that the court was already inclined to impose gang conditions. The court stated that there were "two gang members committing a crime. I don't know if much more is needed." The court

subsequently indicated that it wanted to "research" the issue. At the subsequent hearing in August 2011, the court cited *Lopez* and then identified the reasons for imposing gang conditions of probation in the present case. Those reasons, as we have explained, were significant and compelling even in the absence of any information concerning arrest history or gang expert testimony from another case. The court could reasonably conclude that, based on defendant's age, her acknowledged ties to the Norteño gang, and the circumstances of the offense, gang conditions were necessary as "an essential element of any probationary effort at rehabilitation because it would insulate [her] from a source of temptation to continue to pursue a criminal lifestyle. [Citations.]" (*Lopez*, *supra*, 66 Cal.App.4th at p. 626.)

Accordingly, we determine that reversal of the order imposing gang conditions is not warranted.

B. *Probation Condition Regarding Association with Gang Members*

The probation officer recommended the following probation condition precluding defendant's association with other gang members: "The Defendant shall not associate with any person he/she knows to be or the probation officer informs him/her is a member of a criminal street gang." At the August 26, 2011 hearing, when the trial court orally imposed the no-association condition on defendant and codefendant Perez, the court indicated that they may associate with each other in view of the fact that they were a "couple" and were expecting a child together, and that they were prohibited only from associating with *other* gang members. However, the written gang conditions of probation that are attached to the clerk's minutes of the August 26, 2011 hearing are a verbatim copy of the probation officer's original recommendation, and do not reflect the court's oral statements allowing defendant to associate with Perez.

On appeal, defendant contends that the written probation condition prohibiting her from associating with gang members is "unreasonable" because it would require her to stay away from Perez, who was her boyfriend and father of her child.

The Attorney General acknowledges that the trial court orally stated that the gang conditions applied only to defendant's and Perez's "relationships with other people." The Attorney General further acknowledges that the written gang conditions attached to the clerk's minutes should be modified to reflect the court's oral pronouncement.

In reply, defendant agrees that the written conditions should be modified to conform to the trial court's oral pronouncement.

In view of the record and the Attorney General's appropriate concession, we will order the no-association condition in the written gang conditions that are attached to the clerk's August 26, 2011 minutes modified as indicated in italics: "The Defendant shall not associate with any person he/she knows to be or the probation officer informs him/her is a member of a criminal street gang *other than Anthony Michael Perez*." (See *People v. Harrison* (2005) 35 Cal.4th 208, 226 [if conflict between reporter's and clerk's transcripts cannot be harmonized, the part of the record entitled to greater credence in the circumstances of the case will prevail]; see also *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073 [written gang conditions in minute order modified to reflect conditions orally imposed by the court where discrepancy existed].)

C. *Probation Condition Regarding Presence at Court Proceedings*

The written gang conditions of probation restrict defendant's presence at a court proceeding as follows: "The Defendant shall not be present at any court proceeding where he/she knows or the probation officer informs him/her that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless he/she is a party, he/she is a defendant in a criminal action, he/she is subpoenaed as a witness, or he/she has the prior permission of the probation officer."

On appeal, defendant contends the probation condition is overbroad because it (1) violates her First Amendment right to attend court proceedings generally, (2) violates her state constitutional right to attend and participate in court proceedings if she or a family member is a victim of a crime, and (3) "unjustifiably permit[s] a gang member to

veto [her] right to attend a judicial proceeding simply by showing up and sitting in the audience." Defendant further contends that a probation condition may be challenged for the first time on appeal on the ground that it is unconstitutionally vague or overbroad on its face.

The Attorney General contends that the probation condition is not overbroad because it is "limited to gang-related matters, and bars [defendant] only from specific proceedings, not from the courthouse in general."

1. Right to attend court proceedings generally

Before considering the substance of defendant's constitutional claims, we first determine whether the claims have been forfeited. Our Supreme Court has determined that the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-889 (*Sheena K.*).) In this case, to the extent defendant's claims concerning the constitutionality of the probation conditions present pure questions of law without reference to the sentencing record, we will consider the substance of those arguments.

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) In addition, a probation condition that restricts constitutional rights must be " 'reasonably related to the compelling state interest' in reforming and rehabilitating the defendant. [Citations.]" (*People v. Jungers* (2005) 127 Cal.App.4th 698, 704.)

We understand defendant to first contend that the probation condition is an overbroad restriction of her First Amendment right to attend court proceedings, and that the probation condition should be stricken altogether.

As explained by one appellate court, "[t]he restriction on court attendance is aimed at preventing the gathering of gang members to intimidate witnesses at court proceedings" and is "designed to address the problem of gang affiliation." (*In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502, disapproved on another ground in *In re Sade C.* (1996) 13 Cal.4th 952, 962, fn. 2, 983-984, fn. 13.) "[T]he state's ability to afford protection to witnesses whose testimony is crucial to the conduct of criminal proceedings is an absolutely essential element of the criminal justice system." (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1149-1150; see also *id.*, at pp. 1149-1150, fn. 15 [describing serious problem of witness intimidation by gang members].) Thus, a limitation on defendant's presence at proceedings that involve a gang member may be reasonably related to rehabilitation, by limiting defendant's gang affiliation, and to an important state interest in preventing witness intimidation and protecting the integrity of the justice system.

At the same time, however, the public has a First Amendment right of access to criminal and civil trials. (See *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 603 [acknowledging right of access to criminal trials; "this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment"]; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1212 (*NBC Subsidiary*) [the constitutional right of access extends to civil trials]; *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731, 741 [right of access to courts is an aspect of the First Amendment right to petition the government].) A broad ban on attendance at court proceedings may therefore impinge upon an individual's constitutional right of access.

In *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*), the trial court imposed a probation condition that prohibited the defendant from appearing at " 'any court proceeding' " unless he was a party, subpoenaed as a witness, or had the permission of probation. (*Id.* at p. 952.) On appeal, the defendant argued that the probation condition

was an overbroad restriction of his First Amendment right of access to court proceedings, and that the probation condition should either be eliminated altogether, or modified to refer to court proceedings involving gang members only. (*Ibid.*) This court observed that "[t]here can be a variety of legitimate reasons for being at a court proceeding, other than to intimidate or threaten a party or witness. For example, defendant may need to file a document regarding a family matter or he may, as a member of the public, wish to observe a newsworthy trial not involving a gang member or himself." (*Id.* at p. 953.) While acknowledging the problem of witness intimidation, this court explained that "the current probation conditions as modified already prevent defendant from associating with gang members and from wearing, possessing, or displaying any criminal street gang paraphernalia." (*Ibid.*) The clause allowing for attendance with the probation officer's permission did not rectify the impermissibly "broad sweep" of the probation condition. (*Ibid.*) Thus, this court narrowed the restriction on appearing at court proceedings to only those proceedings "concern[ing] a member of a criminal street gang" or in which "a member of a criminal street gang is present," so that the modified condition read as follows: " 'You shall not be present at any court proceeding where you know or the probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, you are a defendant in a criminal action, you are subpoenaed as a witness, or you have the prior permission of your probation officer.' " (*Id.* at p. 954.) The modified probation condition in *Leon* is worded similarly to the probation condition imposed in this case.

We understand defendant to contend that, based on *Presley v. Georgia* (2010) 558 U.S. 209 [130 S.Ct. 721] *(Presley)*, which was decided after *Leon*, the probation condition restricting her presence at court proceedings concerning gang members must be stricken altogether.

In *Presley*, a trial court barred the defendant's uncle from the courtroom during voir dire. The trial court stated that it did not want the uncle to "intermingle" or sit near

prospective jurors. (*Presley*, *supra*, 130 S.Ct. at p. 722.) The defendant subsequently challenged his conviction on the ground that he had been denied his Sixth Amendment right to a public trial. (*Id.* at p. 723.) The United States Supreme Court explained that before a trial court may exclude the public from "any stage of a criminal trial," the trial court must apply the following standard: " '[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.' [Citation.]" (*Id.* at p. 724.) After concluding that the trial court failed to consider "all reasonable alternatives to closure," the high court reversed and remanded the matter for further proceedings. (*Id.* at p. 725.)

In *In re E.O.* (2010) 188 Cal.App.4th 1149 (*E.O.*), the minor E.O. relied on *Presley*, among other cases, to challenge a probation condition that directed the minor to " 'not knowingly come within 25 feet of a Courthouse when the minor knows there are criminal or juvenile proceedings occurring which involves [*sic*] anyone the minor knows to be a gang member or where the minor knows a witness or victim of gang-related activity will be present, unless the minor is a party in the action or subpoenaed as a witness or needs access to the area for a legitimate purpose or has prior permission from his Probation Officer.' " (*Id.* at p. 1152.) Among other arguments, the minor contended that the probation condition unnecessarily infringed upon his First Amendment right to attend court proceedings. This court was not persuaded by the minor's reliance on *Presley*. This court explained: "Much of his argument on this point relies on principles governing the *closure of trials to the public*, as most recently addressed in *Presley* . . . . That case, however, has no apparent pertinence here except as a general affirmation that there exists a First Amendment right, of largely undefined scope, to attend court proceedings. [Citations.] That right was *not* at issue in that case. The court explicitly acknowledged as much by observing that the appeal necessarily rested on the *defendant's*

right to a public trial under the *Sixth Amendment*, since it was he and not a member of the public (or press) 'who invoked his right to a public trial.' (*Presley*[, *supra*, 130 S.Ct. at p. 723]; see *id*. at [p. 722] [defendant petitioned for certiorari 'claiming his Sixth and Fourteenth Amendment right to a public trial was violated'].) The [*Presley*] court expressly declined to expound upon '[t]he extent to which the First and Sixth Amendment public trial rights are coextensive.' (*Id*. at p. [724].) We fail to detect any logical connection between the holding in that case and any issue now before us." (*E.O.*, *supra*, at pp. 1153-1154.)

In this case, defendant contends that the passage from *Presley* was "taken out of context" by the court in *E.O.* She asserts that the probation condition in the present case "was the type of blanket ban the Supreme Court disapproved of in *Presley* and the other cases it relied on." She contends that, as a member of the public, she has a right to access court proceedings "unless actual prejudice to the case could be shown," and that "[n]o individualized showing of need was made here."

We are not persuaded by defendant's argument that the probation condition restricting her presence at certain court proceedings should be stricken based on *Presley* and other cases concerning the closure of court proceedings to the public. Unlike *Presley* and the other cases upon which defendant relies, the issue in the present case is the formulation of probation conditions that will protect defendant's rights while serving the state's interests of encouraging her rehabilitation and preventing witness intimidation.

Further, assuming, without deciding, that an individualized showing as asserted by defendant must be made in the trial court (see, e.g., *NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1217-1218 [setting forth the findings a trial court must make before substantive courtroom proceedings in ordinary civil cases are closed to the public]), defendant's challenge to the probation condition on this ground has been forfeited because it requires us to consider the particular facts of her case, as developed in the sentencing record in the trial court. As we stated above, a constitutional challenge presenting a pure question of

law may be raised for the first time on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889.) The California Supreme Court has cautioned, however, that not " 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved *without reference to the particular sentencing record* developed in the trial court." [Citation.]' " (*Sheena K.*, *supra*, at p. 889, italics added.) Constitutional challenges not presenting pure questions of law are subject to the traditional objection and forfeiture principles that encourage the parties to develop the record and allow the trial court to properly exercise its discretion. (*Ibid*.) In this case, although defendant's counsel objected below to the imposition of gang conditions *in general*, defendant's counsel never argued that the court proceedings condition *in particular* was objectionable on First Amendment and overbreadth grounds. Defendant's argument on appeal in this regard does not present a pure question of law because it requires us to consider the particular facts of her case, as developed in the sentencing record in the trial court. Consequently, the forfeiture rule applies to this aspect of her constitutional overbreadth challenge.

2. Victim's right to attend court proceedings

Defendant next contends that the probation condition restricting her presence at court proceedings is overbroad because it interferes with her state constitutional right to attend and participate in court proceedings if she or a family member is a victim of a crime. Defendant argues that the probation condition should be modified to permit her attendance at a court proceeding if she or her child, parent, or sibling is a victim. The Attorney General does not specifically respond to this argument.

The California Constitution provides that, "(b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: [¶] . . . [¶] (7) To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and

to be present at all such proceedings. [¶] (8) To be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue." (Cal. Const., art. I, § 28, subd. (b)(7) & (8).) "Victim" includes "the person's spouse, parents, children, siblings, or guardian . . . ." (*Id.*, art. I, § 28, subd. (e).)

As we stated above, the probation condition restricting attendance at court proceedings is worded similarly to the modified probation condition that this court approved in *Leon*, *supra*, 181 Cal.App.4th 943. However, the defendant in *Leon* did not object to the probation condition on the ground that it violated the state constitutional right to attend and participate in court proceedings if the person or a family member is a victim of a crime, as defendant argues in this case.

In *E.O.*, this court considered such a challenge to a probation condition restricting court access. As noted above, the probation condition in *E.O.* directed the minor to " 'not knowingly come within 25 feet of a Courthouse when the minor knows there are criminal or juvenile proceedings occurring which involves [*sic*] anyone the minor knows to be a gang member or where the minor knows a witness or victim of gang-related activity will be present, unless the minor is a party in the action or subpoenaed as a witness or needs access to the area for a legitimate purpose or has prior permission from his Probation Officer.' " (*E.O.*, *supra*, 188 Cal.App.4th at p. 1152.) Among other arguments, the minor contended that the probation condition "unnecessarily infringes his specific right under the state Constitution to attend and participate in court proceedings if he or a family member is a victim of a crime. (See Cal. Const., art. I, § 28, subd. (b)(7); see *id.*, subd. (e) [defining 'victim'].)" (*E.O.*, *supra*, at p. 1155.) The *E.O.* court agreed, stating that the probation condition "not only interferes with these rights, but would also prevent [the minor] from testifying voluntarily or addressing the court in a setting, such as a

sentencing hearing, where comments from members of the public might be received." (*Ibid.*)

The *E.O.* court ultimately struck the probation condition as overbroad, rather than modifying it, and indicated that the trial court should hold a new hearing to reconsider the necessity and purpose of the condition if requested by either party. (*E.O., supra,* 188 Cal.App.4th at pp. 1157-1158.) With respect to the necessity and purpose of the condition, the *E.O.* court explained that "there was no evidence that [the minor] had 'loitered on courthouse property, that he had threatened or would threaten witnesses, or that his presence in a courthouse would incite violence.' [Citation.]" (*Id.* at p. 1157.) In a footnote, the *E.O.* court suggested appropriate language if the trial court were to find such a restriction justified. Relevant here, the suggested language including a restriction on attendance at any gang-related case unless, among other reasons, "You or a member of your immediate family is a victim of the activity charged in the case." (*Id.* at p. 1157, fn. 5.)

In this case, we will order the probation condition modified, as substantially requested by defendant and as indicated in italics: "The Defendant shall not be present at any court proceeding where he/she knows or the probation officer informs him/her that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless he/she is a party, he/she is a defendant in a criminal action, he/she is subpoenaed as a witness, *he/she or his/her child, parent, or sibling is a victim of the activity charged in the case,* or he/she has the prior permission of the probation officer." (See *E.O., supra,* 188 Cal.App.4th at p. 1157, fn. 5.)

3. Other gang member's presence

Lastly, defendant contends that the restriction from being "present at any court proceeding where . . . a member of a criminal street gang is present" renders the probation condition overbroad. She contends that this portion of the probation condition "unjustifiably permit[s] a gang member to veto [her] right to attend a judicial proceeding

simply by showing up and sitting in the audience." "[A]ny gang member could take away [her] right to attend a court hearing simply by showing up and being present in the courtroom, no matter how unrelated the proceeding might be to the gang member's interests." She further argues that "[e]mpowering any gang member to interfere with [her] First Amendment right to attend a court proceeding that does not intrinsically involve gangs [is] absurd, overbroad and unjustified." The Attorney General does not specifically respond to this overbreadth argument.

Defendant's concern that a gang member might decide to show up at a court proceeding in an attempt to interfere with her right to attend a court proceeding, at which she is not otherwise precluded from attending under her probation conditions, is not a constitutional overbreadth challenge that may be considered for the first time on appeal. Her argument requires an examination of the particular facts and circumstances of her case. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889 [challenges to probation conditions involving questions of fact are subject to traditional objection and waiver principles].) The forfeiture rule thus applies to this overbreadth challenge. (*Id.* at pp. 887-889.)

D. *Probation Condition Regarding School Campuses*

The written gang conditions of probation restrict defendant's presence near a school campus as follows: "The Defendant shall not be adjacent to any school campus during school hours unless he/she is enrolled or with prior permission of the school administrator or probation."

On appeal, defendant contends the phrase "adjacent to" is unconstitutionally vague and overbroad.

The Attorney General implicitly concedes that the probation condition is vague. The Attorney General proposes that the probation condition be modified, consistent with *People v. Barajas* (2011) 198 Cal.App.4th 748 (*Barajas*), to prohibit defendant from being within 50 feet of a school campus.

In reply, defendant argues that a requirement to stay 50 feet away is still an overbroad restriction.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' [Citation.] The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' [Citation.] [¶] A probation condition 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; accord *Leon*, *supra*, 181 Cal.App.4th at p. 949.)

In *Barajas*, the defendant challenged as impermissibly vague and overbroad a probation condition nearly identical to the one in the present case. The probation condition in *Barajas* stated: " 'You're not to be adjacent to any school campus during school hours unless you're enrolled in or with prior permission of the school administrator or probation officer.' " (*Barajas*, *supra*, 198 Cal.App.4th at p. 760.) This

court agreed that the probation condition was vague, explaining: "We believe that the meanings of 'adjacent' and 'adjacent to' are clear enough as an abstract concept. They describe when two objects are relatively close to each other. The difficulty with this phrase in a probation condition is that it is a general concept that is sometimes difficult to apply. At a sufficient distance, most reasonable people would agree that items are no longer adjacent, but where to draw the line in the continuum from adjacent to distant is subject to the interpretation of every individual probation officer charged with enforcing this condition. While a person on the sidewalk outside a school is undeniably adjacent to the school, a person on the sidewalk across the street, or a person in a residence across the street, or two blocks away could also be said to be adjacent. To avoid inviting arbitrary enforcement and to provide fair warning of what locations should be avoided, we conclude that the probation condition requires modification.[4]" (*Id.* at p. 761.) The Attorney General in *Barajas* proposed modifying the probation condition to include a 50-foot distance restriction. (*Ibid.*) This court agreed that a 50-foot distance restriction would provide the defendant with "sufficient guidance" (*id.* at p. 762), and modified the condition to state: " 'You're not to knowingly be on or within 50 feet of any school campus during school hours unless you're enrolled in it or with prior permission of the school administrator or probation officer' " (*id.* at p. 763).

In this case, we understand defendant to argue that, regardless of whether the probation condition prohibits being adjacent to, or within 50 feet of, a school campus, the condition would still be an overbroad restriction. In this regard, defendant contends in a conclusory fashion that the school campus condition "impinged on [her] right to loiter

[4] The court in *Barajas* clarified that it did "not intend to suggest that all penal statutes employing the word 'adjacent' are unconstitutionally vague," as such statutes were not currently before the court. (*Barajas, supra*, 198 Cal.App.4th at p. 761, fn. 9.)

and travel without sufficient state justification," and that the probation condition should be stricken altogether.[5]

Defendant does not articulate a persuasive argument as to why a 50-foot distance restriction is overbroad. Further, whether there is sufficient justification or need for the school campus condition requires an inquiry into the particular facts and circumstances of defendant's case. Such a challenge has been forfeited by defendant's failure to raise it below. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889.)

Accordingly, as we find merit to defendant's challenge on the ground of vagueness, and in view of the Attorney General's concession that 50 feet is an appropriate distance restriction, we will order the probation condition modified as indicated in italics: "The Defendant shall not be *within 50 feet of* any school campus during school hours unless he/she is enrolled or with prior permission of the school administrator or probation."

IV. DISPOSITION

The August 26, 2011 order imposing gang conditions of probation is ordered modified as follows.

The probation condition that defendant "shall not be present at any court proceeding where he/she knows or the probation officer informs him/her that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless he/she is a party, he/she is a defendant in a criminal action, he/she is subpoenaed as a witness, or he/she has the prior permission of the probation

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[5] A three-justice plurality of the United States Supreme Court has stated that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." (*Chicago v. Morales* (1999) 527 U.S. 41, 53, fn. omitted (plur. opn. of Stevens, J.).) However, a three-justice dissent has stated that "there is no fundamental right to loiter." (*Id.* at p. 113 (dis. opn. of Thomas, J.).)

There is no dispute that the right of intrastate travel is protected by the California Constitution. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100.)

officer" is modified to state that defendant "shall not be present at any court proceeding where he/she knows or the probation officer informs him/her that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless he/she is a party, he/she is a defendant in a criminal action, he/she is subpoenaed as a witness, he/she or his/her child, parent, or sibling is a victim of the activity charged in the case, or he/she has the prior permission of the probation officer."

The probation condition that defendant "shall not be adjacent to any school campus during school hours unless he/she is enrolled or with prior permission of the school administrator or probation" is modified to state that defendant "shall not be within 50 feet of any school campus during school hours unless he/she is enrolled or with prior permission of the school administrator or probation."

As so modified, the August 26, 2011 order is affirmed.

The clerk of the superior court is ordered to correct the second written probation condition attached to the minutes of August 26, 2011, to state that defendant "shall not associate with any person he/she knows to be or the probation officer informs him/her is a member of a criminal street gang other than Anthony Michael Perez."

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.